

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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SHELDON F. GOLDBERG, et al.,

Case No. 2:17-CV-2106 JCM (VCF)

Plaintiff(s).

ORDER

V.

JACK BARRECA, et al.,

Defendant(s).

Presently before the court is an emergency motion for a temporary restraining order (TRO) and appointment of receiver or trustee filed by plaintiffs Sheldon F. Goldberg, Barbara A. Goldberg, and Beneficial Innovations, Inc. (ECF No. 4). Plaintiffs request this court to enjoin the defendants from their continued involvement in an alleged fraudulent business operation involving a margarita product. *Id.* Plaintiffs further request this court to appointment a receiver or trustee—namely, plaintiff Sheldon Goldberg himself—to take over control of the margarita product venture. *Id.* The motion is denied in its entirety.

I. Facts

This is a civil fraud and breach-of-contract case about margaritas. (ECF Nos. 1, 4). On August 4, 2017, plaintiffs filed a complaint against defendants in this court alleging nineteen causes of action. (ECF No. 1). On August 7, 2017, plaintiffs filed the instant emergency motion for a TRO and for the appointment of a receiver or trustee. (ECF No. 4).¹ On August 8, 2017, this court received defendants' *ex parte* response to plaintiffs' motion for a TRO. (ECF No. 6).

¹ On the same day, plaintiffs moved for a preliminary injunction. (ECF No. 5). This order does not address that motion.

1 In their motion, plaintiffs recite a detailed history of a business relationship between
2 plaintiffs and defendants. In a nutshell, plaintiffs allege that they invested over \$220,000 in a joint
3 business venture with defendants for the purpose of manufacturing and selling a margarita product
4 with plans of creating a company for this purpose going forward. (ECF No. 4).

5 Plaintiffs allege that the defendants encouraged the plaintiffs to continue investing in the
6 venture with assurances that the plaintiffs were considered partners and would reap a share in the
7 profits from the sale of the product. However, plaintiffs allege that when the time to bottle the
8 product drew near, defendants changed their position and indicated an intent to treat plaintiffs'
9 investments as a simple loan and not share the profits. Plaintiffs allege that a distillery in Florida
10 is ready to bottle the margarita product as soon as August 7, 2017, and that if this court allows the
11 Florida distillery to release the bottled product to the defendants thereafter, the defendants will
12 then sell the product and "take the money and run—perhaps even skip town ([defendant] Jack has
13 no family in Las Vegas)." (ECF No. 4 at 2, 15–16). Plaintiffs allege that their investment is "tied
14 up" in the margarita product and if this court "does not intervene, all will be lost," and ". . . the
15 only major asset of the Partnership (the margarita product) would be gone." *Id.* at 15. Further,
16 plaintiffs allege that the defendants intend to "traffic liquor" in violation of Nevada liquor law.
17 (ECF No. 4 at 16). Furthermore, plaintiffs allege that allowing the defendants to receive the
18 margarita product after bottling would mean that third parties "would likely get access to the
19 margarita product and related intellectual property and trade secrets rightfully owned by the
20 Partnership" of which the plaintiffs purport to be a part. (ECF No. 4 at 15).

21 Accordingly, in the present emergency motion, the plaintiffs request that this court enter a
22 twelve-paragraph order detailing the required and proscribed conduct of the defendants going
23 forward in relation to this margarita product venture, including among other things, that the
24 defendants "shall not in any manner sell, grant, transfer . . . or otherwise encumber . . . any product
25 or other property attributable with any interest to . . . any or all of the Defendants, any or all of the
26 Plaintiffs, the Partnership Agreement, and/or a partnership between [the parties] currently located
27 at Florida Distillers' facilities"; that "Defendants shall allow product to be bottled by Caribbean
28 Distillers . . . ('Florida Distillers') . . . but any and all [of this product] . . . must remain and be

1 stored at the Florida Distillers’ facilities pending further order of the Court”; that defendants
2 deposit into a trust account or with the court any proceeds from the sale of the margarita product;
3 and that defendants shall somehow “allow” plaintiffs to enter the premises and facilities of the
4 Florida Distillers—a non-party to this action. (ECF No. 4 at 13–14). Further, plaintiffs request
5 that this court appoint one of the plaintiffs, Sheldon Goldberg, as either a receiver or trustee of the
6 business venture. *Id.* at 24–26.

7 **II. Legal Standard**

8 Under Federal Rule of Civil Procedure 65, a court may issue a temporary
9 restraining order when the moving party provides specific facts showing that immediate and
10 irreparable injury, loss, or damage will result before the adverse party’s opposition to a motion for
11 preliminary injunction can be heard. Fed. R. Civ. P. 65. “Injunctive relief is an extraordinary
12 remedy and it will not be granted absent a showing of probable success on the merits and the
13 possibility of irreparable injury should it not be granted.” *Shelton v. Nat'l Collegiate Athletic*
14 *Assoc.*, 539 F.2d 1197, 1199 (9th Cir. 1976).

15 “The purpose of a temporary restraining order is to preserve the status quo before a
16 preliminary injunction hearing may be held; its provisional remedial nature is designed merely to
17 prevent irreparable loss of rights prior to judgment.” *Estes v. Gaston*, No. 2:12-cv-1853-JCM-
18 VCF, 2012 WL 5839490, at *2 (D. Nev. Nov. 16, 2012); *see also Sierra On-Line, Inc. v. Phoenix*
19 *Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). This court must consider the following
20 elements in determining whether to issue a temporary restraining order and preliminary injunction:
21 (1) a likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief
22 is not granted; (3) balance of hardships; and (4) advancement of the public interest. *Winter v.*
23 *N.R.D.C.*, 555 U.S. 7, 20 (2008); *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1319 (9th Cir.
24 1994); Fed. R. Civ. P. 65 (governing both temporary restraining orders and preliminary
25 injunctions). The party seeking the injunction must satisfy each element.

26 Additionally, post-*Winter*, the Ninth Circuit has maintained its serious-question and
27 sliding-scale test. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).
28 “Under this approach, the elements of the preliminary injunction test are balanced, so that a

1 stronger showing of one element may offset a weaker showing of another.” *Id.* at 1131. “Serious
2 questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can
3 support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a
4 likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135
5 (internal quotations marks omitted).

6 Finally, to obtain injunctive relief, plaintiffs must show themselves to be “under threat of
7 suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent,
8 not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant;
9 and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Ctr. for
10 Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting *Summers v. Earth Island
11 Inst.*, 555 U.S. 488 (2009)).

12 **III. Discussion**

13 **A. Irreparable injury**

14 Plaintiffs have not convinced this court that the injunctive relief requested would prevent
15 immediate and irreparable injury.

16 Plaintiffs complain that failure to issue the requested TRO will result in the plaintiffs failing
17 to realize a return on their investment as soon as they deserve. They argue that waiting for a money
18 judgment would be an inadequate remedy because defendants are insolvent: “Upon information
19 and belief, Defendants have nothing and what few assets they have are liquid.” (ECF No. 4 at 16).
20 But they admit that if the business venture is allowed to continue and “they sell the margarita
21 product, they will have much more by way of liquid assets—i.e. cash.” *Id.* Thus, given that the
22 plaintiffs admit that the defendant will have “much more . . . cash” if the margarita business is
23 allowed to continue uninterrupted, plaintiffs have failed to demonstrate that defendants will be
24 insolvent and unable to satisfy a money judgment. Therefore, the financial hardship plaintiffs cite
25 is not irreparable.

26 Plaintiffs further argue that they believe defendants will skip town with any proceeds from
27 the venture only because Jack Barreca, one of the defendants, has no family in Las Vegas. *Id.* at
28 15. Yet plaintiffs provide no additional, specific facts demonstrating a likelihood that Mr. Barreca

1 intends to “skip town.” This allegation is purely conjectural and hypothetical and is thus
2 inadequate for injunctive relief. *Ctr. for Food Safety*, 636 F.3d at 1171.

3 Plaintiffs also allege that allowing the defendants to continue operating the business might
4 risk their intellectual property and trade secrets fallings into the wrong hands, but they provide no
5 specific facts supporting this speculation of harm and therefore have not convinced this court that
6 such injury is likely; this allegation is also overly conjectural and hypothetical. Moreover,
7 plaintiffs have not convinced this court that a money judgment would not adequately redress this
8 problem if it were to occur.

9 Therefore, this court finds that an award of damages in the form of a money judgment
10 would be an adequate remedy for any of the alleged injuries that the defendants might cause in the
11 absence of the requested TRO, and thus, plaintiffs have not established an irreparable injury.

12 **B. Balance of hardships**

13 Plaintiffs have not convinced the court that the balance of hardships tips in their favor.
14 Plaintiffs ask the court to halt a purportedly urgent and expensive business venture and to require
15 a non-party to this action to keep an unknown quantity of margarita products on their property
16 indefinitely. On one hand, such an extraordinary court intervention in private dealings would
17 likely impose a heavy burden on the defendants, including financial loss, loss of goodwill, loss of
18 property, and damage to the defendants’ relationships with its customers. Moreover, plaintiffs’
19 requested order—requiring all margarita products to “remain and be stored at the Florida Distillers’
20 facilities pending further order of the Court”—appears as though it would produce a hardship on
21 the Florida Distillers, an out-of-state, non-party to this action. (ECF No. 4 at 13). Such an order
22 would require the Florida company to keep an untold quantity of products within its property for
23 an indefinite period of time. *Id.* In any event, the plaintiffs have not established that the court has
24 personal jurisdiction over this Florida-based third party necessary to bind it to this court’s order
25 and force it to comply with a TRO.

26 Furthermore, plaintiffs have not convinced this court that the lack of this TRO will cause
27 them to suffer a greater hardship that the regular course of civil litigation cannot adequately
28 address. In a nutshell, the “hardship” plaintiffs allege that will result from a failure to issue this

1 temporary restraining order is temporary economic loss. However, plaintiffs argue that they are
2 likely to succeed on the merits of their causes of action and therefore are likely to obtain a money
3 judgment in their favor, and they acknowledge that the defendants will not have insolvency
4 problems if they are allowed to continue forward with the margarita product business. Therefore,
5 this court finds that the balance of hardships tips heavily in favor of the defendants. *Winter*, 555
6 U.S. at 20.

7 **C. The public interest**

8 For similar reasons, plaintiffs have not convinced this court that their requested temporary
9 restraining order would advance the public interest. *See id.* The public interest is adequately
10 served in this instance by the plaintiffs' purported right to pursue its claims against the defendants
11 in the regular course of civil litigation. In contrast, the public interest in this case would be
12 breached by this court's drastic intervention in private enterprise on the unsubstantiated allegations
13 of the plaintiffs.

14 **D. Potential for success on the merits**

15 Finally, given the inability of plaintiffs to establish that they will suffer immediate,
16 irreparable injury if this motion is denied, that the balance of hardships tips heavily in favor of the
17 defendants, and that the public interest would not be served by the requested relief, this court finds
18 that whatever merit plaintiffs may have in their ability to demonstrate a likelihood of success on
19 the merits does not, without more, warrant this court's intervention.

20 **IV. Conclusion**

21 Plaintiffs have failed to demonstrate several required elements necessary for this court's
22 extraordinary equitable intervention in the form of a TRO. Further, for the same reasons, this court
23 declines to grant plaintiffs' request for an appointment of a receiver or trustee.

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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's emergency motion for a temporary restraining order and appointment or receiver or trustee (ECF No. 4) be, and the same hereby is, DENIED.

DATED August 9, 2017.

Xenia C. Mahan
UNITED STATES DISTRICT JUDGE